IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 331 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT - Appellant

Versus

IMAMKHAN MOHMEDKHANPATHAN @ MAN - Opponent

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Appearance :
MR ND GOHIL, ADDITIONAL PUBLIC PROSECUTOR for the Appellant.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 06/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal, filed under Section 378 of the Code of Criminal Procedure, 1973, is directed against judgment

dated October 23, 1997, rendered by the learned Special Judge, Bharuch in Special NDPS Case No. 1/97 by which the respondent is acquitted of the offence punishable under Section 20 (b) (i) and (ii) of Narcotic Drugs And Psychotropic Substances Act, 1985 (“the Act”, for short).

2. The facts emerging from the record of the case are as under:

Mr. U. B. Dabhi was discharging duties as PSI of Palej Police Station from June 31, 1994 to June 12, 1997. On November 29, 1996, at about 6.30 P.M., he received an information from his informant that the respondent, who was residing in *Gudafadia*, was dealing in *Ganja* and *Charas* without pass or permit. On receipt of the information, he reduced the same into writing. Mr. Dabhi requisitioned services of *panch-witnesses* and raided the house occupied by the respondent. It is his case that before effecting search of house of the respondent, he had complied with the provisions of Section 50 of the Act. During the search, a tin kept on shelf was found. On opening the same, it was found to be containing *Ganja*. On the ground-floor, there was a small plastic-box, which was also opened and it was found that pills of *Charas*

were kept therein. Again, the first-floor of house was searched, wherefrom a cotton bag was discovered, containing 7 packets of *Ganja*. The offending articles were seized under a *panchnama* and sealed. *Muddamal* was sent to Forensic Science Laboratory (FSL) for analysis. The report of the analysis indicated that those substances analysed were *Ganja* and *Charas* within the meaning of the Act. A complaint was lodged by PSI Mr. Dabhi. On completion of investigation, the respondent was charge-sheeted in the Court of learned Special Judge, Bharuch, for commission of offence under Section 20 (b) of the Act.

3. The learned Special Judge, Bharuch, framed necessary charge against the respondent at Exh. 2. It was read-over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined in all 11 witnesses to prove its case against the respondent. The prosecution also produced documentary evidence in support of its case against the respondent.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the respondent

the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement, as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the respondent claimed that he was innocent. However, no defence evidence was led by him.

5. On appreciation of evidence adduced by the prosecution, the learned Judge has disbelieved the prosecution case and acquitted the respondent by judgment dated October 23, 1997, which roughly runs into 75 closely typed pages, giving rise to instant appeal.

6. This Court has heard Mr. N. D. Gohil, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case. Though the respondent is duly served, he has neither appeared in person nor through his lawyer. On appreciation of evidence adduced by the prosecution, this Court finds that the learned Judge of the Trial Court, who had advantage of observing demeanour of the

witnesses, was justified in acquitting the respondent.

7. Coming to the discrepancy regarding seal used by PSI Mr. Dabhi for sealing *muddamal*, this Court finds that in the *panchnama*, Exh. 12, it is mentioned that the seal, bearing impression of *"PSI Palej"* was used for the purpose of sealing *mudammal*. Jamadar Mansinh, who is examined at Exh. 14, and who had claimed that he was present all throughout, has not described the seal, which was applied on *muddamal*. Again, PSI Udaysinh Dabhi himself has merely stated that he had applied seal on *muddamal*, but has not described the same. However, Scientific Officer, Mr. Jan Mohammad, who had analysed the sample, has in terms, stated that *muddamal* received was having seal of *"PSI NSP Palej"*. He stands corroborated by what is mentioned in report of analysis. Thus, it could not be established satisfactorily by the prosecution that *muddamal* seized was properly sealed. Discrepancy in the evidence regarding seal applied on *muddamal* would prompt the Court to come to the conclusion that in fact, *muddamal* was not sealed at all.

Further, Investigating Officer has stated in his testimony before the Court that *Charas* was found from the

second plastic-box, which was yellow coloured and found lying on ground, but in the *panchnama*, Exh. 12, it is mentioned that green coloured plastic-box was found lying on the ground, which was containing *Charas*. In the *panchnama,* it is mentioned that on the box, which was found from the shelf, writing in Gujarati as *"Afasanaben Imamkhan Pathan, Palej"* was written. However, the report of analysis indicates that on both the tins, *"Tansen Supreme Sugandhik Pan Masala"* was printed. Therefore, it is highly doubtful whether the tins seized from the house of the respondent were in fact despatched to FSL for analysis. Again, the cotton bag, which was seized from the first floor, is described in the *panchnama*. It is mentioned in the *panchnama* that on one side of cotton bag, there was writing, *"Vimal Gutkha"* in English language whereas on the other side, there was writing *"Vimal Gutkha"* in Hindi language. However, Mr. Dabhi, in his testimony before the Court, has stated that on the cotton bag, writing of *"Tulsi Gutkha"* was found in English and Hindi on its both sides. This also makes it highly doubtful whether the cotton bag, which was allegedly seized from the first floor of the house of the respondent, was sent to FSL for analysis. These defects have to be viewed in the light of another fact, namely,

that though the raid was carried out on November 29, 1996, *muddamal* was sent to FSL for analysis on December 4, 1996, and no explanation is offered by any of the prosecution witnesses as to why delay had taken place in despatching *muddamal* to FSL.

Over and above the deficiencies, which have been noted earlier, the prosecution case must fail for non-compliance of mandatory provisions of Section 42 (2) of the Act. Mr. Dabhi has made an attempt to establish that on receipt of information, he had reduced the same into writing, as required by Section 42 (1) of the Act. However, no evidence worth the name is adduced by him to establish that he had forwarded report to his immediate official superior, as required by Section 42 (2) of the Act. The Supreme Court, in catena of decisions, has ruled that non-compliance of provisions of Section 42 is fatal to the prosecution. Facts noticed earlier make it very clear that testimony of PSI Mr. Dabhi is not wholly reliable and cannot be acted upon to fasten criminal liability on the respondent, more particularly when *panch-witnesses*, person, who had weighed offending substances, photographs, etc. have not supported him and turned hostile to the prosecution. Having regard to the

drawbacks and limitations from which the prosecution case is suffering, this Court is of the opinion that the learned Judge of the Trial Court was justified in recording acquittal of the respondent.

8. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As this Court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and this Court is of the opinion that expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of **(1) Girija Nandini Devi & Ors. v. Bijendra Narain Chaudhari, AIR 1967 SC 1124, and (2) State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417.** On overall

appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent. The learned Additional Public Prosecutor has failed to convince this Court to take a view contrary to the one already taken by the learned Judge and, therefore, the appeal is liable to be dismissed.

9. For the foregoing reasons, the appeal fails and is dismissed. Photographs, produced at Exh. 34, be handed-over to the respondent. Except that, other *Muddamal* to be disposed of in terms of directions given by the learned Judge in the judgment impugned in the appeal.

[J.M.PANCHAL,J.]

[H.B.ANTANI,J.]

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